S.B.Criminal Revision Petition No.912/2007

Rajendra Kumar & Anr.
V.
State of Rajasthan

Date of Order :: 25th October, 2007

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. Sanjeev Sharma, for the petitioner.
Mr. Vishnu Kachhawaha, Public Prosecutor.
Mr. Sandeep Mehta, for the complainant.

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By this petition under Section 397 read with 401 Cr.P.C. a challenge is given to the order dated 14.8.2007 passed by Additional Sessions Judge (Fast Track), Parbatsar rejecting an application preferred under Section 311 Cr.P.C.

In brief, facts of the case are that the revision petitioners are facing a criminal trial under Sections 364 and 302 IPC. Shri Nandaram (PW-5) and Shri Bhopalram (PW-3) were examined by the court as prosecution witnesses. Both the persons named above were also examined as witnesses in the same case adjudicating act of co-accused Srikant before the Children Court, Ajmer. According to the petitioners the statements given by the abovenamed two persons before the court of Additional Sessions Judge (Fast Track), Parbatsar and before the Children Court, Ajmer are materially contradictory and, therefore, they want

to cross examine the abovenamed two persons again. Learned subordinate court by order impugned rejected the application on the count that under Section 311 Cr.P.C. a broad discretion vests with the court and in the instant matter possibility of winning over the witnesses Bhopalram and Nandaram cannot be denied.

While assailing validity of the order impugned the contention of counsel for the petitioner is that the court while deciding an application under Section 311 Cr.P.C. is required to act judiciously and in the present matter in the cases relating to same incident the witnesses have given two different statements, thus, the appropriate course was to call them for cross examination.

Per contra, the stand of counsel for the respondent including counsel for the complainant is that calling of witnesses Bhopalram and Nandaram shall be nothing but abuse of process of court as the possibility of winning over them cannot be denied.

Heard counsel for the parties.

Hon'ble Supreme court in the case of Iddar & Ors. v. Aabida & Anr., reported in 2007 AIR SCW 5490, while examining scope of the provisions of Section 311 Cr.P.C., held as under:-

"9.In this context, reference may be made to Section 311 of the Code which reads as follows:-

"311.Power to summon material witness, or examine person present.

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

10.The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry trial or proceeding under the Code : (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it. It is

couched in the widest possible terms and calls for no limitation, either with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

11.The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of inquiry or trial or other

proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

12.As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation : it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code of compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is

> essential or not, must of course depend on the facts of each case, and has to be determined by the Presiding Judge.
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> 13.The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. These aspects were highlighted in Jagat Rai v. State of Maharashtra, AIR 1968 SC 178."

In the present case, it is not in dispute that Bhopalram and Nandaram were examined as prosecution witnesses before the Children Court, Ajmer and their testimony in that case is certainly relevant in the case relating to the petitioners. The reliability of the witnesses is required to be examined by the court after hearing the argument and at this stage it shall not be appropriate to apprehend that witnesses Bhopalram and Nandaram would have been won over. In peculiar facts and circumstances of the

case I am of considered opinion that the court below erred while rejecting the application preferred by the petitioners under Section 311 Cr.P.C. The court should have recalled Bhopalram and Nandaram for cross examination afresh by invoking powers under Section 311 Cr.P.C.

Accordingly, this revision petition is allowed. The order impugned dated 14.8.2007 is quashed. The application preferred by the petitioners under Section 311 Cr.P.C. is allowed. The court below is directed to recall and re-examine Bhopalram (PW-3) and Nandaram (PW-5) for their re-examination.

No order to costs.

(GOVIND MATHUR),J.

Kkm/ps.